IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 683 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HIMATLAL N NALIAPARA

Versus

AMRELI JILLA PANCHAYAT

Appearance:

MR MD RANA for Petitioner

MR JD AJMERA for Respondent No. 1, 2

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: /04/2001

CAV JUDGEMENT

#. Heard learned counsel for the parties.

#. In this petition under Article 226 of the Constitution of India the petitioner is praying for a

direction to respondents nos.1 and 2 to regularize and permanently absorb the petitioner on the post of peon since the post is a permanent one. The second prayer made is for directions to the respondents to grant the petitioner the pay fixation which is available to Class-IV employees on regular establishments with other service benefits together with arrears from the date of his appointment.

#. The facts of the case as emerging from the petition are that the petitioner was taken up as a peon at Tori Ayurved Dispensary on a clear vacant post on retirement of his father in the year 1979. That post is a permanent post and therefore the incumbent who was inducted was required to be appointed on permanent basis but what the petitioner states is that the respondents nos.1 and 2 have exploited the situation and behaved in a very arbitrary manner in not regularizing the services of the petitioner. Under the order dated 6.8.1991 the petitioner was appointed as a daily-rated employee on the post of peon on daily wage of Rs.5.50. This appointment was made, as per the say of the petitioner, with effect from 1st July 1981. The petitioner submitted that without any interruption in the service he has continued to work as a daily-wager. It is stated that the post was sought to be tampered with from full time to part time by an order dated 16th July 1987. The same is evident from the order dated 29th May 1990 addressed to the Medical Officer, Tori. The said letter is with respect to amount to be paid in pursuance of the Government Resolution. Under the said order the Medical Officer was required to submit the clarification since, according to him, the payment is made against particular Resolution. The petitioner submits that though by the order dated 16th July 1987 it was intended to convert the full time post into part-time post, the petitioner has worked for eight hours a day. It is submitted that in pursuance of the letter addressed by the District Ayurved Officer, the Medical Officer gave the clarification vide his communication dated 12th June 1990 that the petitioner was appointed as a daily-wager from 9th February 1979. He also stated therein that the petitioner has been in service since last 10 years i.e. from 1st July 1981 on a vacant post of peon. He has given certain clarification with respect to hours of work. The petitioner urges that on account of number of years of service he has rendered with the respondents, and because of there being no betterment prospects in his service, he filed Regular Civil Suit before the learned Civil Judge (SD) at Amreli on 15th June 1990. In the said suit he had pleaded that he was working for eight hours a day since last a decade

and he is required to be regularized on the said post since the same is a vacant and permanent post. However, in the prayer it is stated that the petitioner should be regularized as a peon with all consequential benefits. There is no relief with respect to pay fixation and equal wages for equal work.

#. In the suit he filed an application seeking interim injunction against termination. The petitioner in para 6 admitted that the suit is pending. But what he states is that the nature of the reliefs is different and the reliefs are such that Civil Court might not be able to grant expeditious relief to the petitioner on the question of equal wages for equal work. It is submitted that the powers of the Civil Court are limited and he had approached this Court through the present petition so that the exploitation of the petitioner by the respondents could come to an end quickly and the petitioner will get justice expeditiously. The petitioner in para 6 of the petition further submitted that he undertakes to withdraw the suit as and when the petition is entertained. A reference is made in para 6 of the petition to Special Civil Application No.116 of 1991 and 164 of 1991 in which identical issues were stated to be raised.

#. Affidavit-in- reply to the Special Civil Application has been filed by the respondent to which rejoinder has not been filed by the petitioner. In paragraph no.2 of the affidavit-in-reply a preliminary objection is raised that no fundamental rights of the petitioner is violated. The petition involves disputed questions of fact. The petitioner has suppressed material facts in the petition and therefore the petition is not maintainable and deserves to be dismissed. It is also submitted that the petitioner has filed Regular Civil Suit NO.180 of 1990 in the Court of Civil Judge (SD) at Amreli against the respondent for a declaration of regular status and for injunction restraining the defendants from terminating the services of the petitioner. The respondents have filed written statements in the suit. The petitioner has also filed an application for interim injunction to the effect that, "the defendants and/or their officers be restrained from discharging the plaintiff from service and/or replacing him by any person by causing termination of his service and/or any other order issued may be kept in abeyance." This application is stated to be dated 15th June 1990. It is urged that the learned trial Court has not granted the temporary injunction as prayed for and therefore the petitioner has not disclosed material facts of having filed Special Civil Suit in the subject matter.

#. Another preliminary objection raised is that the petitioner has already availed of alternative efficacious remedy. Even otherwise he has a right of appeal under Gujarat Civil Service Tribunals Act. On merits, the respondents have come with a case that the father of the petitioner died on 8.2.1979. One V.H. Agrawal who was a full time regular peon had gone on leave and therefore the petitioner was engaged by way of stop-gap arrangement for a period from 6.8.1979 to 14.9.1979. Thereafter the said peon Shri V.H. Agrawal was transferred on 14.9.1979 and therefore the petitioner was continued from 15.9.1979 to 12.4.1980. In place of Shri V.H. Agrawal one Shri Rasiklal Nandlal Trivedi was posted who was transferred from elsewhere and he resumed the duty at Tori Ayurved Dispensary. Said Rasiklal Trivedi went on leave from 18.5.1981 to 30.6.1981 and he was thereafter transferred. In view of the above referred exigencies the petitioner had continued as a daily wager. It is stated that the petitioner was engaged in exigency of work and he was not appointed through proper selection.

#. It is stated that there are recruitment rules governing the recruitment conditions of service of peon to be appointed. On the death of the father of the petitioner, proposal was moved on 16.11.1981 by the District Development Officer to the Development Commissioner for appointment of the petitioner as peon on compassionate ground, but the State Government rejected vide their communication dated 25.11.1986 addressed to the Development Commissioner, Gujarat State informing that the monthly income of the deceased employee is more than Rs.600/= and, therefore, the proposal to appoint the petitioner on compassionate ground cannot be accepted. It is stated by the respondents in the affidavit in reply that as the petitioner's proposal for appointment on compassionate ground was pending, on humanitarian ground he was continued in the services. It is denied by the respondents that the petitioner is working for 8 hours a day. It is stated that the petitioner's working hours are 4 hours between 8.00 a.m. to 12.00 noon. He is a part time employee on hourly basis and he is paid remuneration as per Government resolution dated 2.9.1983 and subsequently modified vide Govt. resolution dated 30.1.1988. the petitioner is entitled to remuneration on this rate but the petitioner does not accept remuneration on this rate. The claim of the petitioner of full time peon was not accepted. It is reiterated that full time post of peon has to be filled in in accordance with recruitment rules inviting names from the Employment Exchange or open markets or from transferring a regular peon serving elsewhere. The petitioner is serving as a

daily rated part-timer for two to four hours a day. It is not in dispute that under the order dated 16.7.1987 at the dispensary full time post was converted into part time one. The other grievances made re. exploitation etc. have also been denied by the respondents.

#. The petitioner has not filed rejoinder to the reply filed by the respondents and as a result of which the averments made by respondents therein stand uncontroverted.

#. From the pleadings of the parties there is no dispute on the following factual aspects between the parties :-

1) Father of the petitioner died while in service and the petitioner's case was considered for compassionate appointment but he was not considered eligible for the same. The petitioner has not challenged this decision of the State Government dated 25.11.1996 to hold him ineligible for the compassionate appointment independently or in this petition.

2) In this petition the petitioner is not claiming the appointment on the post of peon on compassionate ground.

3) The petitioner was appointed as daily wager employee. The post at one stage was permanent post against which the permanent employees were posted and petitioners continued in the services as daily wager which was managed by the respondent.

4) The Government has taken decision to have part time employee at the dispensary looking to the working hours.

5) This decision of the Government to have only part time employee at dispensary has not been challenged by the petitioner.

6) The petitioner has not produced any material whatsoever that he works for 8 hours.

7) The petitioner's appointment as daily wager was not in accordance with recruitment rules or calling names from Employment Exchange or inviting application from open market.

8) The recruitment rules are there for making

appointment in the cadre of Class-IV employees.

9) The petitioner is not praying for a relief on the basis of principle of equal pay for equal work.

##. It is not in dispute that the petitioner filed a Regular Civil Suit No.180 of 1990 in the court of Civil Judge (S.D.), Amreli. This suit as per the case of the respondents, which is not controverted by the petitioner is for declaration of regular status and for injunction restraining the respondent to discharge or terminate services of the petitioner. The petitioner in the suit also filed an application for grant of temporary injunction but the trial court has not granted temporary injunction in his favour. The suit was pending on the day on which this petition is filed. Orally, the learned counsel for the petitioner stated that the suit has been withdrawn but this cannot be taken as a pleading. As for a fact for proof thereof a documentary evidence is available it has to be proved by producing the primary evidence. In case the suit would have been withdrawn the petitioner should have filed the certified copy of the order of the trial court, which is not produced. Even the petitioner has not filed his affidavit.

##. In the Special Civil Application this fact that the petitioner filed the suit and the same is pending is disclosed. He also admitted that in the suit he filed an application for grant of temporary injunction which was not granted. So, it is not the case where it can be said that the petitioner has concealed the facts of filing the suit and declining to grant temporary injunction therein by the trial court. However, one thing is clear that this Special Civil Application is filed by the petitioner after the learned court below declined to grant temporary injunction in his favour. From these facts it can conveniently be inferred that this petition is filed by the petitioner when he failed to get interim relief in his favour from the civil court. Though the copy of the plaint is not produced but from the contents of the plaint given out in the reply by the respondents which are not controverted by the petitioner, I am satisfied that substantially the relief claimed in the suit and in this petition are identical. I find sufficient merits in the preliminary objection raised by the learned counsel for the respondents that the petitioner has already availed equally efficacious remedy.

##. The petitioner has simultaneously availed of two parallel remedies. In this petition, petitioner prayed for the direction to the respondent to regularize and

permanently absorb the petitioner on the post of peon and to give him the pay for the post of peon. From para 2 of the reply I find that in the civil suit the petitioner prayed for a declaration of regular status. If we go by these reliefs claimed by the petitioner in the Special Civil Application and the suit these are substantially identical. This declaration sought of regular status will include all other consequential benefits follows therefrom. The explanation furnished by the petitioner for filing of the petition pending the suit that he is agitating in the petition fundamental rights is wholly misconceived. This is also apparent from the fact that if these two matters would not have been identical then the petitioner would not have undertaken to withdraw the suit as and when the petition is entertained. This statement of the petitioner in the petition leaves no doubt that in this petition and the suit he has prayed for identical relief. The civil suit for the relief as prayed for in this petition is maintainable. The petitioner has already availed of a remedy available for the grievances made in this petition and it is not permissible to him to simultaneously avail of another remedy. On the day on which this petition is presented in the court it has to be stated at the cost of repetition the suit was not withdrawn and there is nothing on the record that the suit has been withdrawn. This filing of the petition, in these facts and circumstances is not permissible to the petitioner. Here, fruitfully reference may have to the 2 decisions of Hon'ble Supreme Court of India and Madras High Court given in the following cases :-

AIR 1777 SC 898 Jaysingh Vs. Union of India

AIR 1996 SC 122 Awadh Bihari Yadav & Ors. Vs.
The State of Bihar & Ors.

AIR 1994 Madras 14 Chemech Engineers Pvt. Ltd. Vs.
the Director of Industries and Commerce & Ors.

##. In this petition the petitioner has not prayed for any interim relief. This petition is presented by the petitioner in the court on 1.2.1991 i.e. after dismissal of his application for interim injunction in the trial court. In the trial court the petitioner prayed for temporary injunction to the effect that the defendants and/or their officers be restrained from discharging the plaintiff from services and/or replacing him by any person by causing termination of his service and/or any

other order issued may be kept in abeyance. Here, the plaintiff means the petitioner and defendants means the respondents. This petition has come up for preliminary hearing before this court on 4.2.1991 on which day pre-admission notice was issued to the respondents. On 22.3.1991 the matter was admitted and the interim relief has been granted in favour of the petitioner in the following terms :-

> "Rule. Expedited. Interim relief restraining the respondents from terminating the employment of the petitioner and further orders; exception accordance with law. The respondents are further directed to pay remuneration and allowance, if any, to the petitioner at the same rate at which he is paid the same at present until further orders".

It is a case where though the prayer has not been made but the court has granted the interim relief to the petitioner. Learned counsel for the petitioner stated that this interim relief has been granted by the court on the oral request made by him on that day. Be that as it may. This interim relief granted by the court continues till this day. It is a clear case of a favour extended to the petitioner by the respondents. Somebody should have been there in the office of the respondents to manage this entry of the petitioner in the service. It is admitted by the respondents in unequivocal terms that the petitioner was continued in the service. He was taken as a daily wager and continued in the service as the proposal made by them for his compassionate appointment was pending consideration before State Government. It is stated that he was continued in the service on humanitarian ground. This reply has been filed by the respondents in the court on 6.2.91. The petitioner was appointed in the year 1979 as daily wager and even it what it is stated by the respondent is taken to be correct, I fail to see any justification whatsoever with the respondents to continue the petitioner in service on humanitarian ground after 25.11.1986. The proposals made of the appointment of the petitioner on compassionate ground was not accepted by the State Government and it has been made clear to respondents under the letter dated 25.11.1986 as per the case of the respondents themselves. The respondents have failed to furnish any explanation whatsoever for this to continue of the petitioner in service after 25.11.1986. It is to be stated at the cost of repetition that the petitioner filed the suit in the year 1990 and admittedly therein he

filed an application for interim relief on 15.6.1990. It is not in dispute that learned civil court has not granted interim relief. In these facts, it is a case where respondents have favoured the petitioner by inducting him as daily wager in the service, continuing him as daily wager and further on rejection of his claim of appointment on compassionate ground this favour which has been extended whether may or not be for some consideration as nothing can be said finally as it is a matter of inquiry. However, on these undisputed facts it is a case of back door entry of the petitioner in the service and dehors of the recruitment rules, the respondents continued the petitioner in service. The respondents are wholly responsible for all these illegalities, favouritism and this litigation. The petitioner did apply for appointment on compassionate ground, this is not his case.

##. The favour which has been extended by the respondents to the petitioner is wholly uncalled for and unjustified. This court is not sitting here to regularize the services of a person who has managed his entry as daily wager in the service. The petitioner has come up before this court for enforcement of his alleged fundamental rights, but the learned counsel for the petitioner has failed to show which of his fundamental right has been infringed in this case. The very induction of the petitioner in the service even as daily wager is contrary to provisions of Articles 14 and 16 of the Constitution of India. This case clearly exhibits an example how the persons sitting in the office of the respondents makes all attempts to favour their own persons to get them enter in service bypassing the recruitment rules as well as constitutional provisions. It is a modus operandi which is being prevailing amongst the persons sitting in the Government officers, Panchayat officer to get their own relations and favourites in the services from the back door. In fact and substance these daily wager and part-time appointments have become a third mode of recruitment to the services dehors of the recruitment rules and constitutional provisions. These daily wager / part-time appointments have become a conduit pipe to the regular appointments. High time has come where the court has to take strict view in such matters and not to go by the sympathy, hardships or humanitarian grounds. These are all irrelevant because crores of persons are not getting employment. Thousands of meritorious persons could have been deprived of their opportunity of employment because of this modus operandi adopted by the persons who are sitting in the government services, Panchayat services, corporation services etc.

for the benefit of their own relations and favourites.

##. The petitioner in this petition is praying for direction to the respondents No.1 and 2 to regularize and permanently absorb him on the post of peon since the post is permanent one. As stated earlier rejoinder to the reply has not been filed by the petitioner and the facts stated in the reply stand uncontroverted. From the facts stated in reply to the special civil application, it is no more in dispute that the petitioner has been favoured by engaging him as a daily wager against leave vacancy. It is also not in dispute that permanent post has been abolished and only part time work is there. Even if it is taken that permanent post was there, I fail to see where the petitioner's appointment is not a regular appointment and recruitment rules are also there, how on the basis of this back-door entry as a daily wager of the petitioner in services, his services are ordered to be regularized as well as he may be given all the benefits. If such a course is adopted by the court, it will not only encourage the wrong doers in service, favouritism and nepotism, but it will render nugatory the recruitment rules as well as the constitutional provisions. The petitioner's continuance in service has been managed. Otherwise also, if everything is taken to be in favour of the petitioner, it is plain and simple case of sympathetic approach of the respondents permitting him to continue in service till the State Government decided re.: his appointment on compassionate ground. But once the State Government has declined to give him compassionate appointment as said earlier, at that stage, forthwith his services would have been terminated but still it is continued by respondents which clearly speaks of favouritism extended to him by the concerned officers. Even interim relief has not been granted by the civil court but his services are continued. Now after filing of this petition, he is continued in services under the interim relief.

##. The learned counsel for the petitioner placed reliance on the decision of this court in Special Civil Application No.495/94 decided on 28.12.98 (Coram: Mr.Justice Kundan Singh). The decision has been given on the facts of that case. It is no more res-integra that decision in a case is on the basis of its own facts. This case is clearly distinguishable and is of little help to the petitioner. The petitioner has not acquired any legal or fundamental right of his regularization in services in the facts of this case.

#. In the result, this special civil application fails

and the same is dismissed. Rule discharged. Interim relief granted earlier stands vacated. In the facts of this case, no order as to costs.

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(mohd)